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THE STATE OF NEW HAMPSHIRE

THE ATTORNEY GENERAL

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July 27, 1984

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Mr. Earl M. Sweeney
Deputy Commissioner
Department of Safety
Hazen Drive
Concord, New Hampshire 03301

Re: RSA CH. 277-A: TOXIC SUBSTANCES IN THE WORKPLACE

Dear Mr. Sweeney:

This is in response to your memorandum dated August 25, 1983 concerning the applicability of RSA ch. 277-A, the Workers' Right to Know Act, to the Department of Safety (Department). Specifically, you have asked whether the Act is applicable to State Troopers, Safety Inspectors, Fire Marshalls, laboratory personnel, and other Department employees who may, from time to time, be exposed to toxic substances while investigating fires, inspecting businesses, responding to emergencies, and otherwise in the performance of their official duties. After reviewing the Workers' Right to Know Act and its legislative history, it is my conclusion that the Act only applies to Department employees who are reasonably likely to be exposed to toxic substances at their customary place of work.

At the outside, I would like to clarify the toxic substances to which the Act applies, as your memo indicates some confusion as to which substances are exempted. The definition of toxic substance at RSA 277-A:3, V(d) expressly includes "any substance which is combustible, a compressed gas, explosive, flammable, a health hazard, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water reactive...." Your memo states that these substances, together with liquors and beverages, are exempted from



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the statute. Please be advised that the exclusion in RSA 277-A:2, V(c) applies only to liquors and beverages; it does not apply to the substances listed in subsection (d) which are clearly within the scope of the statute.

The first question you have asked is whether the Department must keep records and post notices of every toxic substance to which State Troopers, Safety Officers, Fire Marshalls, and other State service employees may be exposed. The brief answer to this question is that the Department must keep records and post notices of only those toxic substances to which their employees are reasonably likely to be exposed in the course of performing their customary work-related duties. Although, by its terms, the statute appears to apply to an employee at "any location, permanent or temporary, where an employee performs any work-related duty in the course of his employment," the statute does not define the term "course of employment" and a reasonable meaning of this phrase must therefore be implied according to the intent and purpose of the Act.

RSA 277-A:5 provides that every employer whose employees handle, use, or are otherwise exposed to any toxic substance during the course and scope of their employment shall keep on file, and make available upon request, material safety data sheets for each toxic substance "to which an employee may be exposed in carrying out his duties." Such employers must also post notices, near work areas, of certain information about the toxic substances to which the employees may be exposed, conduct training programs for all employees who are routinely exposed to toxic substances, and comply with other recordkeeping and reporting requirements relative to toxic substances to which employees may be exposed. RSA 277-A:6 provides that any employee who requests information required to be kept by the employer pursuant to RSA 277-A:5, and who does not receive the information within five (5) days, may refuse to work with a toxic substance until the information is provided. In addition, RSA 277-A:9 provides for a \$2,500.00 civil penalty for each violation of the Act.

RSA 277-A:2 contains a statement of the Legislature's intent and purpose in adopting these provisions:

[T]he general court therefore determines that it is appropriate for employers to provide their employees with all available information concerning the nature of the toxic substances to which such employees may be exposed during the course of their employment and the suspected hazards these substances pose and to take all other practicable and feasible measures to protect their employees from the risks of toxic substances. (Emphasis added.)

The emphasized language in this statement of legislative intent clearly indicates that the Legislature expected only practical and feasible requirements to be imposed on employers in order to protect employees from the risks of exposure to toxic substances. If the Act were construed in such a way as to require an employer to keep records and post notices of every toxic substance to which an employee could possibly be exposed to while performing a work-related duty away from the customary workplace, every employer in the State would have to keep records and post notices of nearly every toxic substance used in the State. Such an onerous requirement would be unreasonable, contrary to the stated intent of the Act. It is a well-established principle of statutory interpretation that a statute will not be construed in such a way as to lead to oppressive and absurd consequences. In re Moore, 99 N.H. 209 (1954).

For these reasons, we conclude that the Act does not require the Department of Safety to keep records and post notices of every toxic substance to which State Troopers, Safety Officers, Fire Marshalls, and other employees may possibly be exposed in the course of performing any work-related duty. Such recordkeeping and notice requirements apply only to those toxic substances to which the Department's employees may be reasonably expected to be exposed at their customary place of work.

The same rationale applies to your second question relative to the Department's responsibility under the Act with respect to employees in the Forensic Laboratory and the Hazardous Waste Materials Enforcement Unit. Since it is impossible to determine every toxic material to which these employees may be exposed in their workplaces, the Act should be interpreted reasonably so as to apply only to those toxic materials to which the employees are reasonably likely to be exposed. See, In Re Moore, supra. Such materials would include chemicals used regularly by the laboratory to conduct its analyses and for other purposes, but would not include materials brought to the laboratory for analysis. Any other interpretation would lead to the unreasonable result that laboratories would have to post notices and keep material safety data sheets relating to all materials brought to the laboratory for analysis. It would be impossible for laboratories to comply with such a requirement since materials are usually brought to the laboratory for identification, and until the substance is identified, the employer cannot post the required notices and maintain the necessary documentation under the Act.

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In conclusion, RSA 277-A, the Workers' Right to Know Act, must be reasonably interpreted so as to apply only to toxic materials to which employees are reasonably likely to be exposed in the course of performing their customary work-related duties. I trust this adequately addresses your questions. Should you need further assistance in this matter, please do not hesitate to call this Office.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Gregory H. Smith" with "F&L" written below it.

Gregory H. Smith
Attorney General

GHS:EHO/clp
83-13-F

cc: Vance R. Kelley, Commissioner,
Department of Labor